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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

JOE R. STEELE
Petitioner

versus

UNITED STATES OF AMERICA
Respondent

PETITIONER'S BRIEF IN REPLY TO BRIEF OF UNITED STATES IN OPPOSITION

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This reply brief will be directed topically, and in short form, to matters raised by the Government in its Brief in Opposition.

I. LACK OF PROPER PREDICATE

The Government argues that the trial court is permitted to draw upon his recollection of the evidence at the first trial to infer the existence of a conflict not made a matter of record at the second trial. A predicate for impeachment cannot be laid by presumption; it cannot be laid by inference; it must be laid by evidence *in the record*. The prior inconsistent statement and the circumstances under which it was given must be called to the attention of the witness in such a way as to give him a full opportunity for explanation or exculpation. *The Charles Morgan v. Kouns*, 115 U. S. 69. This requirement was complied with in *Raffel v. United States*, 271 U. S. 494 (Footnote at Page 495).

Thus Steele was entitled to have called to his attention any alleged inconsistency between his testimony at the second trial and his silence at the first trial. This was the predicate which was necessary.

The predicate serves a secondary purpose. It demonstrates to the jury that the showing of *alleged inconsistency* is the only purpose of the evidence. But the complete absence of a predicate here left the jury free to conclude that the petitioner had committed some wrong by failing to testify at the first trial. This made the possibility "far from negligible" that the jury made "impermissible use of the testimony." *Grunewald v. United States*, at page 954, 1 L. Ed. 2d.

The opinion of this Court in *Grunewald v. United States*, 353 U. S. , 1 L. Ed. 2d 931, 951; sustains the contention here asserted in the following language:

> "Thus, although later, in the charge to the jury, the matter was specifically restricted to the issue of credibility, *there was no inquiry by the judge at the time of the initial admission of this evidence* as to whether a sufficient showing of inconsistency had been made." (Footnote 30) (Emphasis added)

Even assuming that a predicate, properly laid, would make the evidence admissible, no proper predicate was laid here and the admission of the evidence was error.

II. NECESSITY FOR RAISING CONSTITUTIONAL QUESTIONS IN TRIAL COURT

Summarized, the Government's contentions here are that (1) petitioner by his failure to testify in

his own behalf at the first trial did not claim his Constitutional privilege against self-incrimination under the Fifth Amendment, and (2) that objections of petitioner's counsel at the time the question was asked at the second trial did not sufficiently apprise the trial court that a Constitutional question was raised.

A. Failure to Take Stand Is Claim of Constitutional Privilege Per Se

At a trial of a criminal case how else can a defendant claim his privilege against self-incrimination than by refraining from taking the stand? Although no case has been found wherein the novel concept raised by the Government here has been passed upon, this Court has assumed that the act of not taking the stand *is* the claim of the privilege in the following language:

> "The defendants . . . stood on their constitutional right not to take the witness stand before the jury." *McNabb v. United States*, 318 U. S. 332, Footnote 5, Page 338.

Cases cited by the Government in support of this contention relate to hearings before Congressional committees and administrative tribunals and not to court proceedings and hence are not in point.

B. Sufficiency of Objections to Raise Question of Abuse of Privilege Against Self-Incrimination

The Government contentions on this matter are refuted by the following considerations:

1. The simple act of asking the question in the presence of the jury was reversible error per se. Regardless of a ruling of the Trial Judge sustaining objections (if such had been the case), the damage had been done. No instruction could have corrected it.

2. The Trial Judge knew precisely what the question was. In passing upon the objections, the court said his action in overruling them was "based on a Supreme Court decision" (R. 1076). The function of an objection is to make certain that the court understands why the evidence is considered inadmissible. It is crystal clear that he was familiar with *Raffel v. United States*, 271 U. S. 494, (the only "Supreme Court decision" which could have been relied on as sustaining the Government's position) that he considered it controlling and that he felt its requirements had been met.

3. The privilege, once asserted, as it had been by failure to testify at the first trial, was subject to protection by the court. The evidence admitted on the second trial, reflecting as it did upon the man who asserted the claim, was a misuse of the privilege itself. "But the responsibility for misuse of the grant of the claim of privilege is the court's." *Johnson v. United States*, 318 U.S. 189, 199. Reassertion of the privilege was not necessary. It had already been claimed. The Trial Judge knew it. Petitioner had a right to protection from the trial court in not permitting the claim of privilege to be used against him.

4. The objection itself was sufficient. All that was necessary was that the court understand that the

privilege had been claimed on the first trial (which is patent from the record here) and that the admission of such evidence would be harmful and prejudicial to petitioner. Such was done in the following language:

> ". . . can serve no other purpose than to inflame and prejudice the minds of the jury against the Defendant and lead to a conviction on this trial."

C. Sufficiency of Objections to Raise Due Process and Fair Trial Questions

The Government asserts "Although petitioner objected to the question he did not object on the ground that it would affect any constitutional right of his." (Government Br. P. 5). Petitioner says that violation of due process and denial of a fair trial do not necessitate objection. But, if they do, the objection here was full and complete. It called attention of the Trial Judge to the fact that the question (a) violated the "ground rule instruction" and (b) was irrelevant and immaterial to any issue in the case, and (c) that the admission of the evidence would inflame and prejudice the minds of the jurors against the defendant. These grounds were amply sufficient to call to the attention of the Trial Judge that the petitioner would be denied due process, *Watkins v. United States*, ____ U.S. ____, 1 L. Ed. 1273, 1299, and likewise be denied a fair trial.

CONCLUSION

Finally the Government contends that because petitioner was a gambler and the jury knew it, and

also because the question was only a "single question" in a record of "well over a thousand pages of testimony" the entire matter is "wholly insignificant." (Government Br. P. 13)

A gambler, no less than any other citizen, is entitled to a fair trial. He is entitled not to have the rules changed in the middle of the game. The Trial Judge said he made his ground rule on the assumption that the defendant would not take the stand. Certainly such must have been his assumption because he stated such to be a fact, but there is not one iota of evidence in the record that such a representation was ever made to him or that his ruling and instruction was predicated on that condition. When petitioner took the stand the court was notified, out of the hearing of the jury, of his intention to do so, and yet no warning was given of the change in the "ground rule." Certainly the court can change any such rule, but a defendant is entitled to timely, full and fair notice of such change. No such notice was forthcoming here.

The contention that this was but a single question in a long record is comparable to the old contention that the man who was killed with an ice pick had only a small, insignificant hole in his body. Petitioner was harmed just as badly by the evidence as if it had been repeated a thousand times. This Court took notice of the harmful effect of such evidence in *Grunewald v. United States* in the following language:

> "... the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true incon-

> sistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible."

Petitioner can only ask, if the evidence was so insignificant why was it thought necessary to ask the question and to urge its admissibility in the face of vigorous objection?

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I hereby certify that I have delivered a copy of the above Petitioner's Brief in Reply to Brief of United States in Opposition to counsel named above by depositing in the United States Mail, with first class postage prepaid, to the Post Office address indicated in each instance:

BEN F. FOSTER